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IN THE

Supreme Court of the United States

October Term, 1969
No. 196

CARL E. ECKERSTROM, A-1521,

Petitioner,

vs.

H. V. FIELD, Superintendent, *et al.*,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

No published opinions have been filed in petitioner's case in connection with the issues he seeks to raise here. Several orders have been entered both in the state and federal courts and copies of these are forwarded as exhibits to be lodged with the court along with this response.

Jurisdiction

Petitioner recites a series of cases in the state and federal courts, but does not specify a particular order he is seeking to review. Possibly he is seeking to have reviewed an order of the California Supreme Court denying habeas corpus under 28 U.S.C. § 1257(3) or

an order of the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1254(1). After we give some chronology of the litigation we will review in more detail petitioner's right to review in this Court.

Statutes Involved

Petitioner appears to have sufficiently set forth any pertinent statutes or constitutional provisions.

History of the Case

In 1936 petitioner was convicted of a violation of two counts of California Penal Code section 288 (lewd and lascivious conduct), the terms to run concurrently. The court also found that petitioner came within the provisions of section 644 of the Penal Code (the habitual criminal act) due to two prior felony convictions. [Exh. pp. 27-28.]

On February 8, 1944, petitioner was granted parole after having served 12 calendar years. He was paroled January 5, 1949. He was still serving a maximum life sentence. [Exh. p. 52.]

On April 18, 1950, petitioner's parole was suspended. He was found guilty of parole violation and his parole was revoked. [Exh. p. 57.]

On July 16, 1956, petitioner was again paroled but still serving a maximum life sentence.

On July 31, 1958, petitioner's parole was again suspended. [Exh. p. 58.]

On January 24, 1967, the Superior Court of San Luis Obispo County granted habeas corpus and removed the finding of habitual criminality. [Exh. pp. 24-25.]

The United States District Court described petitioner's resulting sentence as follows:

> "Thus, petitioner is serving concurrent sentences only for the two violations of section 288 of the Penal Code which at the time of petitioner's conviction were punishable by not less than one year in prison. Where a penal statute provides only a minimum sentence, the maximum is life. People v. Camp, 42 Cal. App. 411, 425." [Exh. p. 65.]

Questions Presented

Petitioner appears to advance the following arguments:

1. That he should have had counsel when the Adult Authority set his term;

2. That he should have had counsel and a trial when his parole was suspended;

3. That the Adult Authority should not be allowed to keep him after his term was voided;

4. An antedated document was used against him.

Preliminary Statement

Of the many petitions filed, there appear to remain two possible roads to this Court that merit discussion.

The first involves a habeas corpus case brought in the United States District Court in Los Angeles. *Eckerstrom v. Field,* 68-248-FW. Petitioner made various complaints about his sentencing, counsel was furnished to him, memoranda were filed, and the District Court resolved the issues against him in an extended opinion. [Exh. p. 64.] He made some effort to appeal but has not secured a certificate of probable cause to do so.

See 28 U.S.C. § 2253. Petitioner made application to the Ninth Circuit Court of Appeal but in November of 1968 it was denied as premature so petitioner could first apply to the District Court. [Exh. p. 70.] Petitioner tells us that on December 2, 1968, the United States District Court entered an order denying reconsideration of the petition for certificate of probable cause. (Pet. p. 76.) It would appear that petitioner should be required to seek the certificate from the Ninth Circuit before that court's action should be reviewed since the only apparent action by that court was to deny the application as premature.

Petitioner also filed a petition for writ of habeas corpus in the California Supreme Court on March 21, 1969, which was denied on March 26, 1969. [Exh. pp. 71 *et seq.*] *See* 70 A.C. No. 14, Minutes, p. 2. (Petitioner gives a date of denial of March 26, 1968, but this appears to be a clerical error as to the year.)[1]

[1]The record before this Court may depend on whether the order of the State Supreme Court or the Ninth Circuit Court of Appeals is being reviewed, or whether the petition is treated as an application for habeas corpus.

ARGUMENT

I.

The Right to Counsel Does Not Extend to the Parole Process

Petitioner argues that he had a right to counsel both when his parole was revoked and also when his term was arrived at by the Adult Authority. He cites *Mempa v. Rhay,* 389 U.S. 128 (1967), "which extends to federal protection the California rule requiring the presence of counsel at the time of imposition of sentence after revocation of probation (see In re Turrieta (1960) 54 Cal. 2d 816, 819 [8 Cal. Rptr. 737, 356 P. 2d 681]) . . . ." *In re Cleaver,* 266 Cal. App. 2d 143, 161, 72 Cal. Rptr. 20.

Mempa involved revocation of probation where there was imposition of a deferred sentence. As the court noted at the outset of the opinion, the case involved "the question of the extent of the right to counsel at the time of sentencing where the sentencing has been deferred subject to probation." 389 U.S. at 130. The instant case involves the setting of a term by a prison board (the Adult Authority), and the revocation of parole. A parole proceeding differs from a probation proceeding in that the latter is conducted before a court.

The Adult Authority, in deciding to grant or revoke parole, is not constituted in a way that lends itself to according a right to counsel in this large group of cases. The situation thus differs from *Mempa* where this Court took care to point out that "counsel [and presumably the court] . . . would not be unduly burdened by being requested to follow through at the deferred sentencing stage of the proceedings." 389 U.S. at 137.

Requiring counsel would impose an excessive burden on the machinery of the administration of justice, outweighing any speculative benefit. *In re Marks,* 71 A.C. 33. Courts have expressed concern that such a requirement could discourage release of prisoners on parole. *See Williams v. Dunbar,* 377 F. 2d 505, 506 (9th Cir. 1967); *In re Marks, supra.*

It may fairly be stated that the decisions generally have declined to extend *Mempa* to proceedings before parole boards. *See Earnest v. Willingham,* 406 F. 2d 681, 682-683 (10th Cir. 1969); *Peinado v. Adult Authority of Department of Corrections,* 405 F. 2d 1185, 1186 (9th Cir. 1969); *Dunn v. California Department of Corrections,* 401 F. 2d 340 (9th Cir. 1968); *Williams v. Patterson,* 389 F. 2d 374, 375 (10th Cir. 1968); *Rose v. Haskins,* 388 F. 2d 91, 97 (6th Cir. 1968), *cert. denied,* 392 U.S. 946 (1968); *Hutchison v. Patterson,* 267 F. Supp. 433, 434-435 (D. Colo. 1967); *Williams v. Craven,* 273 F. Supp. 649, 650 (C.D. Cal. 1967); *cert. denied,* 393 U.S. 916 (1968); *Sorensen v. Young,* 282 F. Supp. 1009, 1010 (D. Minn. 1968); *In re Cleaver,* 266 Cal. App. 143, 161, 72 Cal. Rptr. 20; *see also Eason v. Dickson,* 390 F. 2d 585 (9th Cir. 1968), *cert. denied,* 392 U.S. 914 (1968); *Williams v. Dunbar,* 377 F. 2d 505, 506 (9th Cir. 1967), *cert. denied,* 389 U.S. 866 (1967); *Briguglio v. New York State Board of Parole,* 246 N.E. 2d 512, 515, 24 N.Y. 2d 21 (1969); *Beal v. Turner,* 454 P. 2d 624, 627 (Utah, 1969); *Johnson v. Stucker,* 453 P. 2d 35, 39, 203 Kan. 253 (1969).

II

Petitioner Was Only Entitled to Have the Excessive Portion of His Term Set Aside

Petitioner originally was sentenced to state prison on two counts of violating section 288 of the California Penal Code as well as a habitual criminal adjudication because of two prior felony convictions. [Exh. pp. 27-28.]

In 1967 the habitual criminal adjudication was set aside. [Exh. p. 25.] This reduced petitioner's effective term from a mandatory life sentence as provided in section 644 of the Penal Code to one year to life as inferred from section 288 as it read when he was convicted. Now he complains that he should not be held after the finding of habitual criminality is voided.

However, we agree with counsel who represented petitioner in the United States District Court with respect to his citation of *In re Kingsbury,* 74 Cal. App. 2d 959, 963, 170 P. 2d 82, which held that where the adjudication of excessive criminality is incorrect, the judgment is still valid for the main offenses charged and only void as to the excessive imprisonment imposed. [Exh. p. 62.]

The San Luis Obispo Superior Court subsequently held that the inaction of the Adult Authority operates to keep the term at maximum. [Exh. p. 51.] Permit us to emphasize, however, that "inaction" here is a conscious and thought-out act, and not a process of overlooking the case. The Adult Authority would regularly

review the case and its failure to lower the term is a form of action.

Although the fact was not before the federal courts or the State Supreme Court, it now appears that petitioner has had his term fixed and been granted a parole date [Exh. p. 88.] We have been advised that petitioner will be released on parole on February 24, 1970, and will be discharged three years later.

III

Petitioner Has Not Been Prejudiced by Any Antedated Document

Petitioner attacks what he calls an "ante-dated document." (Pet. for cert. p. 4.) His point is not entirely clear to us, but we assume he is referring to the summary of sentencing data. [Exh. pp. 57-59.] He has claimed that it is not accurate and that he is entitled to more credits. [Exh. p. 82.]

The United States District Court said the following:

> "There is no determined amount of accumulated credits which would entitle a prisoner sentenced to life imprisonment to release. It is therefore unnecessary to review the question respecting credits of petitioner, whether they be accumulated or invoked." [Exh. p. 68.]

If petitioner seeks to rely on the fact that his term is now set, it would appear to be appropriate to require him to present that fact to the courts below.

Conclusion

For the foregoing reasons it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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